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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1985

STATE OF DELAWARE,

Petitioner,

v.

PERCY E. WAINWRIGHT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Do *Rhode Island v. Innis* and *Edwards v. Arizona* prohibit the police from explaining to the suspect, during the booking process, the nature of the offense with which he is charged and the factual basis for his arrest?

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PETITION FOR WRIT OF CERTIORARI

The State of Delaware, petitioner, requests that a writ of certiorari issue to review the judgment and opinion of the Delaware Supreme Court entered February 21, 1986.

OPINION BELOW

The opinion of the Supreme Court of Delaware is officially reported at 504 A.2d 1096 (Del. 1986). It is reproduced in the Appendix to this Petition beginning at App. 1.

JURISDICTION

The judgment of the Delaware Supreme Court, reversing respondent's convictions for first degree murder and an associated weapons offense, was entered on February 21, 1986. On April 14, 1986, Justice Brennan extended the time in which to file a petition for certiorari to May 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Although the judgment below vacated the convictions and remanded for a new trial, the judgment is final for purposes of review by this Court because Delaware law would preclude, in the event of an acquittal upon retrial, a subsequent prosecution appeal of the federal issue now presented. *Florida v. Meyers,* 466 U.S. 380, 381 n.* (1984) (*per curiam*); *California v. Stewart,* 384 U.S. 436, 497, 498 n.71 (1966) (decided with *Miranda v. Arizona*).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Self-Incrimination Clause of the Fifth Amendment to the United States Constitution provides "nor shall [any person] be compelled in any criminal case to be a witness against himself."

2. Although not directly involved in the question presented, the following provisions of the Delaware Code were involved in the prosecution and are reproduced beginning at App. 18. Del. Code Ann. tit. 11, §§ 271(2)(b), 636(a)(6), 1447 (1979); Del. Super. Ct. Crim. R. 3, 4(b)(1), 4(c)(3), 5(a)-(b) (1975 & 1984 Supp.).

STATEMENT OF THE CASE

Following a jury trial, respondent, Percy E. Wainwright, was convicted of first degree murder for his participation in the attempted robbery of a liquor store and the killing of the store clerk, William Hastings.[1] On appeal, the Delaware Supreme Court reversed the conviction, deciding that the trial court had, in light of *Edwards v. Arizona*, 451 U.S. 477 (1981), committed plain error when it admitted into evidence a post-arrest statement made by Wainwright. It concluded that because Wainwright had requested counsel in response to the *Miranda* warnings given at the beginning of the booking or processing procedure, the police could not afterwards, as part of the normal booking routine, inform him of the factual basis for his arrest. To the Delaware court, such a disclosure was impermissible "re-interrogation" under *Rhode Island v. Innis*, 446 U.S. 291 (1980) and *Edwards*, which rendered inadmissible Wainwright's subsequent statements, uttered forty-five minutes later, denying any culpable participation in the crime.

The question presented by this petition is what constraints the definition of "interrogation" crafted by this Court in *Innis* imposes on a police policy to disclose to all

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[1] Del. Code Ann. tit. 11, § 636(a)(6) (1979) [App. 18]. Wainwright was also convicted of possessing a deadly weapon, a shotgun, during the murder. Del. Code Ann. tit. 11, § 1447 (1979) [App. 18]. Wainwright's culpability was premised on Delaware's accomplice liability provision. Del. Code Ann. tit. 11, § 271(2)(b) (1979) [App 18]. Wainwright was sentenced to life imprisonment for the murder and to a consecutive 15 year term of imprisonment on the weapon charge.

suspects, during the arrest and booking process, the nature of the offenses for which they are being held and the facts which caused their arrest. Without guidance from this Court on that issue, the police will soon find themselves in the midst of a dilemma under *Miranda v. Arizona*, 384 U.S. 436 (1966) which they cannot win. Some suspects will urge that such disclosures are a prerequisite to establishing a valid waiver under *Miranda*. If the police heed those entreaties, their conduct will soon be attacked by others, such as respondent, who will argue that disclosures are impermissible interrogation. Only this Court can chart the appropriate course for the police to follow.

1. The Hold-Up and Murder

During the evening of November 3, 1980, customers entering Lord's Liquor Store in Bridgeville, Delaware noticed David Dodson, distinctive with his long black hair, green trenchcoat, and floppy hat, pacing nervously in front of the store. Tr. I91 (James); I197-98 (Stuart); II217 (Williamson).[2] Thirty minutes later, an off-duty police officer saw Dodson standing along the roadway 100 yards from the store with a shiny object protruding from beneath his coat. As the officer passed in his car, Dodson crossed the highway and ran across a field. Tr. II221-22 (Morris). On the shoulder of the road where Dodson had been walking lay a shotgun shell. It had been fired from a shotgun which Dodson, accompanied by Wainwright, had obtained a few months earlier in Pasadena, Maryland from

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[2] Although the customers did not know Dodson and could only describe the man they saw, Wainwright at trial admitted that Dodson sought to rob the store that night and killed the store clerk. Tr. II75-82 (Wainwright).

Roger Jeffers, a friend of Wainwright's. Tr. II283-85 (Marvel), II247-56 (Jeffers). At the liquor store, William Hastings, the clerk, lay dead, killed by a point-blank shotgun blast.

The following year, Dodson, who at the time of the murder had been an escapee from a Maryland prison, was recaptured. Charged in the Hastings homicide in October 1981, Dodson was returned to Delaware for trial, arriving on November 11, 1982. During questioning by police, he said that he had been the "lookout" man for the robbery while Wainwright had entered the store.[3] When he, standing outside, heard the shotgun fire, he ran to the nearby truck used by the pair. Wainwright quickly followed him, and the two then returned to Federalsburg, Maryland, where they were living.[4]

After Jeffers confirmed to them that Wainwright knew Dodson, the Delaware State Police obtained, on the basis of Dodson's recitations, a Delaware warrant for Wainwright's arrest. Based on the existence of that warrant, the Maryland State Police, accompanied by a Delaware officer, arrested Wainwright in Baltimore on November 11, 1982. Tr. I4, 13 (Griffith). He was then held in Mary-

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[3] Until this time, the police had no evidence suggesting Wainwright's involvement in the robbery and killing. He was also not a person "known" to the police.

[4] At a separate trial, Dodson was convicted of first degree murder and possession of a deadly weapon and subsequently sentenced to life plus twenty years of imprisonment. His appeal is currently before the Delaware Supreme Court. *Dodson v. State, appeal docketed,* No. 158, 1984 (Del. June 11, 1984).

land under a fugitive warrant issued by a local court. Several days later, Wainwright waived extradition.[5]

2. The Booking

On November 16, 1982, Willard Griffith, a Delaware State Police officer, picked up Wainwright in Maryland and drove him to the local police barracks in Delaware, arriving there around noon. There, he was to be processed or booked prior to being taken before a magistrate for his initial appearance.[6] Tr. I6 (Griffith).

Before beginning the fingerprinting and photographing processes, Griffith read the *Miranda* warnings to Wainwright. In response, Wainwright said he wanted an attorney. Tr. I6-7, 15 (Griffith). As part of the regular processing of suspects, Griffith then told Wainwright that he had been charged with first degree murder for Hastings' death and that the charge had been based on Dodson's statement that Wainwright and he had gone to the liquor

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[5] Consistent with the Uniform Extradition Act (Md. Ann. Code Art. 41, § 28 (1982)), the Maryland fugitive warrant merely recited that Wainwright was wanted for murder in Delaware. Contrary to the recitation of the court below (App. 14 n. 1), in this pre-Governor's warrant situation, the Maryland court, in issuing the fugitive warrant, was not required to give to Wainwright a liturgy of the procedural protections surrounding his extradition. Rather, the duty of that court was merely to determine whether Wainwright was the person wanted under the Delaware warrant. *Id.* § 29. Moreover, when Wainwright waived extradition, the only judicial inquiry necessary was whether he understood that he was foregoing awaiting the issuance of a Governor's warrant. *Id.* § 39.

[6] *See* Del. Super. Ct. Crim. R. 5(a) (App. 20). No magistrate was available at the nearby Justice of the Peace Court until after 1:00 p.m. Tr. 18, 15 (Griffith).

store and Wainwright had shot the clerk. Griffith testified, without contradiction, that his recitation was done only to inform Wainwright and that he always gave that information to suspects. That recital accurately recounted Dodson's narrative and was consistent with the affidavit submitted in support of the application for the arrest warrant. Tr. I8, 16-17, 20-21, 24-26 (Griffith).[7] After completing the processing, Wainwright was given lunch at the barracks, the only police contact with him being that necessary to feed him. Tr. I18 (Griffith).

A few minutes before 1:00 p.m., Griffith, without comment, drove Wainwright to the nearby Justice of the Peace Court. As they entered the courthouse parking lot, Wainwright turned to Griffith and said, "I didn't kill that man, he [Dodson] stabbed me twice." Tr. I8, 18-19 (Griffith). Griffith told Wainwright that, in light of his earlier request for an attorney, he could not talk to him about the

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[7] That recitation was also consistent with Del. Super. Ct. Crim. R. 4(c)(3) (App. 19-20) which requires an arresting officer, if he does not have the warrant in his possession, to "inform the defendant of the offense charged and of the fact that a warrant has been issued." Although the Delaware Supreme Court expressed some skepticism about Griffith's testimony, the record gives no reason to find that the procedure here was not a routine one. First, the trial court at the suppression hearing never suggested that the procedure of informing Wainwright "of the charges pending against him, including the evidence that the State had" was unique. Tr. I28-29. Secondly, trial defense counsel, a public defender with over ten years of experience, never indicated at the suppression hearing that he thought the procedure was extraordinary. When Wainwright questioned the procedure for the first time on appeal, the Delaware Supreme Court refused the prosecution's request that the matter be remanded for a further evidentiary hearing to clarify the issue.

case. Tr. I9, 19, 22-23 (Griffith). Not satisfied with this answer, Wainwright asked if he could retract his earlier request for counsel. Griffith said he would call the prosecutor and attempt to arrange a meeting with a lawyer for Wainwright and the prosecutor. Tr. I9, 28 (Griffith).

As Wainwright watched, Griffith's attempts to contact the prosecutor from the courthouse were unavailing. Tr. I11, 19-20 (Griffith). Griffith then asked Wainwright if he wanted to make a statement at that time. Tr. I20 (Griffith). Wainwright did not ask for an attorney or choose to remain silent. Tr. I10 (Griffith). Instead, he explained to Griffith that on the day of the murder, Dodson and he had been riding in his truck and drinking. Dodson kept saying he wanted to commit a robbery, but Wainwright repeatedly demurred. As they passed through Bridgeville, Dodson ordered him to stop the truck. When Wainwright refused, Dodson stabbed him twice in the chest. Wainwright then stopped the truck, and Dodson, carrying a shotgun, left. Dodson returned a few minutes later, yelling for him "to get out of here." On the trip back to Federalsburg, Dodson told him he had shot Hastings. Tr. I11-13 (Griffith), II40 (Griffith).

3. The Trial

Prior to trial, Wainwright moved to suppress his statement. Accepting Wainwright's proffer that his initial utterance in the parking lot was "spontaneous" and not involved in the suppression motion, Tr. I27 the trial court found that after exercising his right to the presence of a lawyer, Wainwright "wanted to initiate a further conversation and withdraw the exercise of that right and

wanted to make a statement." Tr. I29. Concluding that none of the prior conduct of Griffith caused Wainwright to make that decision, the trial court held his detailed statement admissible. Tr. I29-30.[8]

At trial, Wainwright testified in accord with his post-arrest statement. He repeated that he had waited in his truck down the road while Dodson entered the liquor store only because Dodson had, minutes before, physically assaulted him and stabbed him twice in the chest with a knife, causing blood to flow. Tr. II75-82 (Wainwright).[9] Disbelieving Wainwright's exculpatory statements, the jury found him guilty.[10]

4. The Delaware Supreme Court

The Delaware Supreme Court reversed, holding that the officer's accurate recitation of the basis for Wain-

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8 The prosecutor had referred the court to *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), and argued that the utterance in the parking lot constituted the necessary "suspect-initiated" contact. Defense counsel did not dispute that conclusion. Tr. I27-28.

9 Wainwright never reported the incident. Indeed, he told a friend afterwards that Dodson and he had been involved in a robbery which was supposed to be "easy" but that someone had been killed. Tr. IV115-16 (W. Fischer).

10 At trial, Wainwright testified that he had first met Dodson on the docks of Baltimore in September, 1980. The prosecution presented several witnesses who recounted that Wainwright had, beginning in 1977, frequently visited Dodson at a Maryland prison. Tr. IV107-08 (W. Fischer), IV 119-20 (D. Fischer).

wright's arrest was interrogation under *Innis*.[11] Rejecting Wainwright's trial court concession that his approach to Griffith in the parking lot was spontaneous, the Court concluded that all of Wainwright's statements were barred under *Edwards*. The court ignored the legitimate non-investigatory purpose behind informing suspects of the factual cause for their arrest. Thus, disclosure of such information is always prohibited, at least when the revealed information is highly incriminatory.

REASONS FOR GRANTING THE WRIT

1. The Lower Courts are in Conflict Concerning Whether Actions "Normally Attendant to Arrest and Custody" Constitute Interrogation

In *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980), this Court held that the term "interrogation," for purposes of triggering the prophylactic procedural safeguards of *Miranda*, "refers not only to express questioning, but also to any words or actions on the part of the

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[11] In apparent *dicta*, the Delaware court also indicated that even if Griffith's recitation of the basis for Wainwright's arrest was not interrogation, the prosecution had not established a valid *Miranda* waiver for the second statement. That conclusion apparently rested on the notion that because Griffith did not reach the prosecutor to arrange a meeting, Wainwright could not make an intelligent decision to intentionally forego his prior invocation of the right to counsel. That premise, that a suspect may not withdraw a prior request for counsel except in the presence of counsel, has been rejected. *Bradshaw*, 462 U.S. at 1046-47; *Wyrick v. Fields*, 459 U.S. 42, 47 (1983). Thus, if this Court would reverse on the interrogation question, Wainwright's statements would be admissible.

police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Since then, the lower courts have often been confronted with situations, as in the prosecution here, where the police have, during the arrest or booking process, explained to the suspect the nature of the offense for which he was being held and the facts which caused him to be arrested. The courts have struggled to resolve the question whether those words or actions on the part of the police constitute "interrogation" or, instead, fall within the language in *Innis* which appears to craft an exception for conduct "normally attendant to arrest and custody."[12] Their answers have been conflicting.

The view adopted by the Delaware court is that, even assuming the legitimacy of a police policy to furnish such information to all suspects during the arrest process, the question of whether such a disclosure constitutes "interrogation" must be judged on a case-by-case basis. The suppression court must in each case make a *post hoc* evaluation of whether, in light of the content of the disclosure, the police officer should have known that compliance with a general policy of informing suspects of the cause

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[12] Although in this case the disclosure came after Wainwright requested counsel, the issue of what constitutes "interrogation" is not limited to "invocation" situations. *Edwards* and *Innis* clearly preclude "interrogation" after the suspect has requested counsel. But more generally, *Miranda* precludes any "interrogation" prior to the recital of the *Miranda* warnings and a valid waiver by the suspect. 384 U.S. at 444, 467-68. Thus, under the reasoning of the court below, the police officer would have violated *Miranda* if he had made the same disclosure prior to, or as part of, his first recitation of the *Miranda* warnings.

of their arrest would likely elicit an incriminating response. If the officer should have realized that possibility, his disclosure will be considered "interrogation." If, on the other hand, the information which was disclosed was not "highly incriminatory accusations" (App. 14), the officer's conduct will be considered permissible. The Delaware court's view is not unique. In neighboring Maryland, the courts have similarly held that the police "re-interrogate" a suspect who has requested a lawyer if they deliver to him, as seemingly required by a court rule,[13] a copy of the "Statement of Charges" and accompanying probable cause affidavit. *See State v. Quinn,* 498 A.2d 676, 677-78 (Md. Ct. Spec. App. 1985), *cert. denied,* 503 A.2d 253 (Md. 1986); *Conover v. State,* No. 1105, Sept. Term 1985 (Md. Ct. Spec. App. Apr. 2, 1986) (*per curiam*) (App. 22), *petition for cert. filed,* No. 99, Sept. Term 1985 (Md. Apr. 18, 1986).

In effect, this analysis erases the parenthetical phrase out of the *Innis* definition: all police conduct, even that attendant to arrest and custody, must be evaluated as to whether it was reasonably likely to elicit an incriminating response. In practical terms, it requires the arresting police officer to make, in often hurried circumstances, an appraisal whether compliance with a general procedure of disclosing the cause for the arrest will violate *Miranda.* Fully aware that the evidence underlying the arrest was sufficiently accusatory to justify the suspect's detention, he must determine whether the information might or might not prompt the suspect to reply. Even assuming that the officer is competent to make such a difficult decision, *but*

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[13] Md. Rules (Criminal Causes) 4-211, 4-212 (1986).

see Innis, 446 U.S. at 304 (Burger, C.J., concurring), such an *ad hoc* procedure is plainly inconsistent with *Miranda*'s goal of providing clear guidance to the police on the manner in which to conduct a custodial investigation. *Moran v. Burbine,* 106 S.Ct. 1135, 1143 (1986).

Other courts have been unwilling to ignore the fact that *Innis* plainly excepts from the general definition of "interrogation" conduct "normally attendant to arrest and custody." Consistent with this Court's opinion in *South Dakota v. Neville,* 459 U.S. 553, 564 n. 15 (1983), those courts have held that police conduct during arrest, booking, and custody, undertaken to further other legitimate governmental goals, will not be considered "interrogation" even if in any particular case the actions may "reflect a measure of compulsion above and beyond that inherent in custody itself." *Innis,* 446 U.S. at 300.[14] *Cf. New York v. Quarles,* 104 S.Ct. 2626, 2632 (1984) (legitimate interest in public safety justified exception to *Miranda*'s rules); *California v. Byers,* 402 U.S. 424, 448-53 (1970) (Harlan, J., concurring) ("hit and run" self-reporting statute, although it may compel incriminating information in particular case, does not violate the Self-

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[14] In *Neville,* this Court held that a police officer's inquiry to an arrested driver whether he would take a breath test to measure blood alcohol content was not interrogation under *Innis.* In making that determination, this Court did not deny that the inquiry might foreseeably cause incriminating verbal responses and that confronting the driver with the choice whether to submit to the test creates pressures upon the suspect beyond those inherent in his detention. Rather, because the question was a routine one given to all suspects and furthered other legitimate governmental interests, this Court determined that the question fell within the exception for conduct "attendant to arrest and custody."

Incrimination Clause because state's interest in enforcing civil laws justified impairment of some drivers' Fifth Amendment interests). Thus, the Ninth Circuit has held that the police may, without implicating the *Miranda* safeguards, explain to a suspect the nature of the charge and the evidence against him. Because that information may contribute to an intelligent exercise of his judgment or that of his lawyer, the police disclosure is conduct "attendant to arrest and custody." *United States v. Crisco*, 725 F.2d 1228, 1232 (9th Cir.), *cert. denied*, 104 S.Ct. 2360 (1984); *United States v. Thierman*, 678 F.2d 1331, 1334 n. 3 (9th Cir. 1982). *See also United States v. Wilson*, 571 F.2d 455, 456-57 (9th Cir. 1978) (after suspect requested lawyer, police disclosure of new charge filed did not violate *Miranda*); *United States v. Pheaster*, 544 F.2d 353, 366-68 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977) (after suspect said he wanted a lawyer, police review of evidence against him was not "interrogation"); *United States v. Davis*, 527 F.2d 1110, 1111 (9th Cir. 1975), *cert. denied*, 425 U.S. 953 (1976) (police display of bank surveillance photograph to robbery suspect who previously invoked did not violate *Miranda*).[15]

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[15] The Ninth Circuit has approved such disclosures even when it is performed independent of other "booking" procedures. Because in this case the information was disclosed at the same time Wainwright was being photographed and booked, this petition does not present the question of the validity of such police conduct outside the arrest and booking context. When the recital is given at a time when the police are performing other tasks in preparation for taking the suspect for his initial appearance, the disclosure of the basis for his arrest surely does not convey to the suspect the message that he will be held by the police until he gives a statement.

Other jurisdictions, both state and federal, have reached similar conclusions. *See, e.g., United States v. Guido,* 704 F.2d 675, 677-78 (2d Cir. 1983) (no *Edwards* violation where DEA agent during fingerprinting explained to suspect facts which cause his arrest); *United States v. Gordon,* 655 F.2d 478, 485-86 (2d Cir. 1981) (no *Edwards* violation where FBI agent after fingerprinting explained to suspect nature of charge and basis for arrest); *United States v. Rodriguez,* 606 F. Supp. 1363, 1378 (D. Mass. 1985) (no *Miranda* violation where FBI agents gave detailed description of case to suspect before administering warnings); *State v. Williams,* 333 S.E.2d 708, 717 (N.C. 1985) (no *Edwards* violation where officer delivered to suspect, as required by law, search warrant return listing seized incriminating evidence); *People v. McCuaig,* 338 N.W.2d 4, 7 (Mich. App. 1983) (no *Edwards* violation where police described to suspect nature of charge and events that led to his arrest). *See also State v. White,* 460 A.2d 1017, 1020-21 (Me. 1983) (officer's inquiry whether suspect understood charge was "booking" question and not "interrogation"); *State v. Perez,* 422 A.2d 913, 914-16 (R.I. 1980) (disclosure in *Miranda* warnings that suspect was charged with robbery was not interrogation).[16]

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[16] In addition, English practice under the Judges' Rules, which *Miranda* viewed as an appropriate model, 384 U.S. at 486-87, requires that when the suspect is charged by the police he must be given, along with the warnings concerning his right not to answer questions, a statement of the charges lodged against him. The statement must describe in simple language the particulars of the offense. The Judges' Rules, Administrative Directions on Interrogation and the Taking of Statements No. 6(a), Home Office Circular No. 31/1964,

(Continued on following page)

This Court should grant this petition in order to resolve this conflict between the lower courts.

2. The Decision Below Threatens The Legitimate Law Enforcement Interest of Routinely Informing Suspects of the Cause for Their Arrest.

The decision below seemingly holds that the officer's explanation of the basis for Wainwright's arrest had to be considered "interrogation," not conduct "attendant to custody and arrest" because the disclosure of such information is "unnecessary" and "gratituous." App. 14. It thus implies that the police officer can never give the suspect the type of information given to Wainwright, even if the suspect asks for it, absent a waiver. If not questioned, that conclusion will have a substantial impact on law enforcement and criminal justice practices.

Though the Constitution does not compel the states to provide a suspect all the information which might prove helpful to him in intelligently exercising his various procedural rights in the criminal process, *Burbine*, 106 S.Ct. at 1142, criminal justice systems have usually been structured so as to provide suspects, at the earliest practical time, information concerning the reasons for their arrest and detention. Thus, most state criminal procedural codes require the police, acting with or without a warrant, to promptly disclose to the person arrested the nature of the

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reproduced at A Model Code of Pre-Arraignment Procedure, Appendix VI at 655 (1975) [ALI]. Indeed, after the lodging of charges, the Judges' Rules allow the police to bring to the suspect's attention a statement made by the co-defendant so long as nothing is said to invite a reply or comment. The Judges' Rules V, reproduced at Model Code at 653.

offense charged or the cause for his arrest. *See, e.g.*, Del. Super. Ct. Crim. R. 4(c)(3); Cal. Penal Code § 841 (West 1970); Ill. Ann. Stat. ch. 38, § 103-1(a), (b) (Smith-Hurd 1980); Mich. Comp. Laws Ann. §§ 764.18, 764.19 (1982). Moreover, they encourage the authorities, as early as possible, to provide information about the offense and the cause for the arrest beyond rudimentary recitals of the name of the crime. *See United States v. Hodge*, 487 F.2d 945, 946 (5th Cir. 1973) (*per curiam*) (explanation of charges under UCMJ [10 U.S.C. § 831(b)] includes explanation of evidence against suspect). *Cf.* F.R.Crim.P. 5(c) (at initial appearance, suspect to be informed of contents of complaint *and any affidavit* filed to support it); Del. Super. Ct. Crim. R. 5(b) (App. 20-21) (same).[17] Early disclosure of the factual basis for his arrest allows the suspect to accurately assess whether his cooperation with the police may redound to his benefit in the form of release or reduced charges. *See Michigan v. Mosley*, 423 U.S. 96, 109 n. 1 (1975) (White, J., concurring). Moreover, even when the suspect has indicated a desire to have counsel in his contacts with the police, disclosing the evidentiary basis for the arrest to the suspect insures that his counsel will promptly have that information, to use not only in his discussions with his client about the risks or benefits of cooperation, but also in mounting any prompt legal challenge to the arrest or custody.

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[17] Ironically, if the reasoning of the court below here stands, such a disclosure by the magistrate at the initial appearance would constitute impermissible "interrogation." *But see State v. McClain*, 442 N.E.2d 1131, 1131-32 (Ind. App. 1982) (magistrate's explanation of charges at initial appearance, which prompted suspect's statement, not interrogation).

The Delaware court, invoking the name of *Miranda*, suggests that those interests are so insubstantial that the practice of disclosing the evidentiary basis for an arrest should be abandoned. This petition should be granted to correct that mistaken notion.

3. The Decision Below Places The Police in A Dilemma Concerning Disclosure of Information

Finally, unless this petition is granted, the police may soon find themselves in a dilemma concerning the disclosure of information about the cause for arrest and the strictures of *Miranda*. If the police choose not to provide any or only minimal information to the suspect at the time of the arrest, defendants will argue that their subsequent statements are inadmissible because the absence of information concerning the nature of the crime or investigation made their *Miranda* waivers unintelligent. *See, e.g., People v. Spring*, 713 P.2d 865, 871-75 (Colo. 1985), *cert. granted*, 54 U.S.L.W. 3738 (U.S. May 5, 1986) (No. 85-1517); *Carter v. Garrison*, 656 F.2d 68, 70 (4th Cir. 1981), *cert. denied*, 455 U.S. 952 (1982); *United States v. McCrary*, 643 F.2d 323, 328-29 (5th Cir. 1981). If, in response to those challenges, the police choose to make full disclosure, they will, as here, find that their conduct is classified as impermissible "interrogation." In *Spring*, this Court will announce what information about the nature of the offense the police *must* provide. By granting review in this case, this Court can give the lower courts and the police clear guidance concerning what information about the offense the authorities *may* provide.

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CONCLUSION

For the above reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 21, 1986

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PERCY EWELL WAINWRIGHT, Defendant Below, Appellant,	)	No. 365, 1983
v.	)	Court Below: Superior Court of the State of Delaware in and for Sussex County
STATE OF DELAWARE, Plaintiff Below, Appellee,	)	Cr.A. Nos. S82-11-0061, 1061 and 2061

Submitted: October 29, 1985

Decided: February 21, 1986

Before CHRISTIE, Chief Justice, McNEILLY, HORSEY, MOORE and WALSH, Justices, constituting the Court *en banc.*

Upon appeal from Superior Court. REVERSED and REMANDED for a New Trial.

Nancy Jane Mullen, Esquire, Assistant Public Defender, Wilmington. Attorney for Appellant.

Gary A. Myers, Esquire, Deputy Attorney General, Department of Justice, Georgetown. Attorney for Appellee.

WALSH, Justice:

The defendant, Percy Ewell Wainwright, was convicted following a jury trial in Sussex County of first degree felony murder, 11 *Del. C.* § 636(a)(6), and possession of a deadly weapon during the commission of a felony. The State declined, during trial, to seek the death

penalty, and the defendant was sentenced to life imprisonment without probation or parole on the murder charge with a consecutive fifteen year sentence on the weapons charge. The charges stemmed from his participation in the November 3, 1980, attempted robbery of a Bridgeville liquor store and the killing of a store clerk. A codefendant, David Wayne Dodson, was convicted of the same offenses in a separate trial and sentenced to life imprisonment after a jury declined to impose the death penalty.

Although the defendant assigns a number of errors alleged to have occurred at the trial level, we focus on but one. He argues that certain oral statements were obtained by the police in violation of his Fifth Amendment right to counsel under *Miranda v. Arizona,* 384 U.S. 436 (1966). Since we conclude that it was plain error to deny suppression of such statements we must reverse and remand for a new trial.

I

The factual record underlying the admissibility of the disputed statements is drawn from the suppression hearing at which the only witness was Detective Griffith of the Delaware State Police. The defendant did not testify at the suppression hearing.

There were no eyewitnesses to the shooting of the liquor store clerk, and no identifiable fingerprints were recovered from the scene of the crime. However, police investigation led to the arrest of David Dodson on November 11, 1982, for the murder. Dodson told the police that he and the defendant were present at the time the clerk was shot, but that the defendant went into the liquor store

to rob it and shot the clerk while Dodson remained outside. Based on Dodson's statement, a fugitive warrant was issued and the defendant was arrested at his residence in Maryland on the same day. Detective Griffith accompanied a Maryland State Police detective when the warrant was executed. The Maryland officer read the defendant his *Miranda* rights and advised Wainwright about the warrant on file in Delaware for first degree murder but the defendant declined to give a statement to Griffith.

The defendant waived extradition and was brought back to Delaware on November 16, 1982. On the morning of November 16, when Detectives Griffith and Lee of the Delaware State Police went to Anne Arundel County Prison to pick up the defendant and transport him to Delaware, the Delaware detectives did not read the *Miranda* rights to the defendant. The detectives simply transported the defendant in silence to the Delaware State Police Barracks in Georgetown.

Upon arrival at the Barracks in Georgetown, the defendant was first taken to the Troop Commander's Office where he was advised "why he was brought back to Delaware and what he was being charged with." Detective Griffith read the *Miranda* rights to the defendant from a card issued to the state police. In response, the defendant stated that he would like to have an attorney present. At that point, Detective Griffith stopped questioning the defendant and took him to the processing room. Detective Griffith testified that before the defendant was taken to the processing room, however, he advised the defendant that he was being charged with "murder one of Mr. William Hastings at Bridgeville, Delaware," and that the rea-

son he was being charged was that codefendant David Wayne Dodson had given a complete statement describing how he and Wainwright had gone to Lord's Package Store where Wainwright shot Hastings. Detective Griffith described the exchange as follows:

Q. And you told him the substance of what David Dodson had said?

A. Yes, sir.

Q. What was that?

A. That Mr. Dodson had admitted going to the package store with Mr. Wainwright, but in his statement he had stated that he had been going to stay outside the package store while Mr. Wainwright had gone in, and Mr. Wainwright had been the one that went inside the package store and committed the murder.

Q. So within five or ten minutes after this man said he wanted an attorney, you were telling him what David Dodson had said?

A. I was advising him why he was brought back to Delaware and what he was being charged with.

Q. And you were telling him the substance of the statement that the police got from Dodson?

A. Yes, sir.

Q. What was his response to this?

A. There was no response.

After fingerprinting, the defendant was given lunch and placed in a cell. No conversation took place during lunch. At about 1:00 p.m., Detective Griffith took the defendant to the Magistrate Court, located approximately three hundred yards from the police station. Detective Griffith testified that as he pulled up to the Magistrate

Court the defendant turned to him and said: "I didn't kill that man, he stabbed me twice." At that point, Griffith advised the defendant that since he had elected to have counsel, the detective could not talk to him about the case. The defendant then asked Griffith if he could retract his request for counsel, and Griffith told the defendant that he would call the "District Attorney" and have a defense attorney present, and then the defendant could tell his story. Griffith next told the defendant that if he had not pulled the trigger and killed the man, he might be held as a material witness.

Detective Griffith unsuccessfully attempted to reach a deputy attorney general but did not attempt to reach a defense attorney. Immediately after talking with the deputy attorney general's secretary, Detective Griffith asked the defendant whether he wanted to make a statement or tell the detective what happened. The defendant then made a statement in which he confessed to driving his pickup truck through Bridgeville on the night of the murder, but maintained that Dodson stabbed him after he refused to stop the truck. The defendant finally stopped the truck, and Dodson got out of the truck with a twelve-gauge shotgun. Wainwright waited and a short time later Dodson returned and told the defendant to "get out of here."

At the suppression hearing, defense counsel did not contest the admissibility of the first statement made by the defendant. Defense counsel conceded that "[c]ertainly the officer cannot be expected to control spontaneous statements." Instead, defense counsel challenged the ad-

missibility of the defendant's second statement as a violation of the defendant's right to counsel under *Miranda.*

At the suppression hearing the prosecutor, citing *Oregon v. Bradshaw,* — U.S. —, 103 S.Ct. 2830 (1983) argued that the defendant's statement as he arrived at the Magistrate Court was, itself, initiation of further communication with the police, and the defendant's subsequent statement that "I don't want an attorney now" was a valid waiver of his right to counsel under *Miranda,* after which he willingly gave a statement. Defense counsel did not effectively rebut this argument, and the trial judge, after a recitation of the facts as he understood them, concluded that:

> The only thing that the State has to show is that the defendant was warned of his constitutional rights, that he understood them, and that he waived them. It is clear that he understood them from the fact that he exercised them the first time, and it is further clear that he wanted to waive them by the fact that he asked to waive them.
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> In this particular case, it is clear that he understood them and that he exercised them, and according to the testimony of Officer Griffith, he wanted to initiate a further conversation and withdraw the exercise of that right and wanted to make a statement. . . . I cannot say that giving him lunch, informing him of the evidence, and bringing him to the Justice of the Peace Court was such overbearing tactics by the police that he was not exercising in (sic) free will. . . .

Because defendant's trial counsel conceded that the defendant's first statement was spontaneous, the trial judge focused only on the waiver aspect of the question of admissibility and ruled, in effect, that defendant's desire to

waive his previously invoked right to counsel was established by his own words.

II

As a threshold consideration we must confront the question of whether the scope of our review may extend to claimed error which was not raised at the trial level. Indeed, the State contends that the concession of partial admissibility by defense counsel not only misled the trial court but now requires this Court to rule upon a question not fairly raised on the trial record.

This Court, in the exercise of its appellate authority, will generally decline to review contentions not raised below and not fairly presented to the trial court for decision. Supreme Court Rule 8; *Jenkins v. State,* Del. Supr., 305 A.2d 610 (1973). On evidentiary issues, the general rule is that evidentiary questions may not be raised for the first time on appeal. *Stevenson v. Henning,* Del. Supr., 268 A.2d 872 (1970). Thus, failure to object to the admissibility of evidence in the trial court may preclude a party from raising the objection for the first time on appeal. *See Young v. State,* Del. Supr., 431 A.2d 1252 (1980); *Rochester v. Katalan,* Del. Supr., 320 A.2d 704 (1974); Del. R. Evid. 103.

To expedite finality and promote economy in litigation, Rule 103 of the Delaware Rules of Evidence requires the parties to raise timely objections to evidence in the trial court or risk losing the right to raise evidentiary issues on appeal. Failure to make an objection at trial constitutes a waiver of the defendant's right to raise that issue on appeal, unless the error is plain. *Goddard v. State,*

Del. Supr., 382 A.2d 238 (1977). Rule 103 allows the appellate court to take notice of "plain errors affecting substantial rights" of the parties on appeal, even though the error was not brought to the attention of the trial court. *See* Del. R. Evid. 103(d).

Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. *Dutton v. State,* Del. Supr., 452 A.2d 127, 146 (1982). Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice. *Brownwell v. State,* Del. Supr., 427 A.2d 884, 893 n. 12. Recently, claims of error implicating basic constitutional rights of a defendant have been accorded review by this Court notwithstanding their nonassertion at trial. *Deputy v. State,* Del. Supr., 500 A.2d 581, 589 (1985); *Flamer v. State,* Del. Supr., 490 A.2d 104, 112 (1983).

The significance of the trial judge's ruling on the admissibility of the defendant's statements to Detective Griffith is obvious. Except for these statements, the State's evidence against Wainwright was essentially circumstantial, since Dodson, called as a witness by the defense, refused to testify on grounds of self-incrimination. It is equally clear that the question of the admissibility of Wainwright's statements was one of constitutional dimension. The U.S. Supreme Court's recent decisions in *Edwards v. Arizona,* 451 U.S. 471 (1981) and *Oregon v.*

Bradshaw, — U.S. —, 103 S.Ct. 2830 (1983) make it clear that once an accused has exercised his right to remain silent under *Miranda,* the determination of whether subsequent statements are admissible is based on a two-part test. For such statements to be admissible, the prosecution must establish that the accused initiated further contact with the police, and validly waived his previously invoked right to counsel. The first part of the *Edwards* test — the initiation of further communication by the accused — must be considered before proceeding to decide whether there was a valid waiver. *Edwards,* 451 U.S. at 485; *Bradshaw,* 103 S.Ct. at 2834.

In this case, defense counsel's concession that the defendant's first statement was "spontaneous" probably caused the trial judge to focus only upon the "waiver" part of the *Edwards* test. Although the prosecutor, in arguing for the admissibility of the statements, properly noted that the *Bradshaw* decision discussed the importance of determining which party initiated further conversation after the accused had invoked his right to counsel, the trial judge ruled that "[t]he only thing that the State has to show is that the defendant was warned of his constitutional rights, that he understood them, and that he waived them." Since this statement reflects an incomplete analysis of the proper test to determine whether both of the defendant's statements should have been admitted into evidence, this error is clearly prejudicial to substantial constitutional rights of the defendant and jeopardized the fairness of the trial process. Where there is plain error, the fact that the error may have been "invited" by the actions of defense counsel does not render it less significant or result in a forfeiture of appellate review.

See State v. Harper, N.J. Super. App. Div., 319 A.2d 771, *cert. denied,* 65 N.J. 574, 325 A.2d 708 (1974); *cert. denied,* 68 N.J. 284, 344 A.2d 318 (1975).

III

Our review of the record requires that we examine the evidence presented by the State at the suppression hearing in the light of the State's heavy burden of demonstrating the voluntary relinquishment by a defendant of his previously asserted request for counsel. We begin with the language of *Miranda:*

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.
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> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda, 384 U.S. at 473-75.

In *Edwards* the Supreme Court established a bright-line rule for determining compliance with *Miranda.* This rule was further clarified in *Smith v. Illinois,* — U.S. —, 105 S.Ct. 490 (1984). In *Edwards,* the court established a "rigid prophylactic rule" that once an accused in custody expresses a desire to deal with the police only through counsel, he "is not subject to further interroga-

tion by the authorities until counsel has been made available to him" unless there is a valid waiver of his request for counsel. *Edwards,* 451 U.S. at 485-86; *Smith,* 105 S.Ct. at 492. In *Edwards* and *Smith* the Supreme Court clearly outlined the analysis which this bright-line rule establishes.

> First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.

Smith, 105 S.Ct. at 493. The purpose of the *Edwards* rule is to prevent police badgering or overreaching in an effort to wear down the accused despite his request for counsel. *Smith,* 105 S.Ct. at 494.

The *Edwards* standard has not proved to be easy in application and, as the divergence of opinions in *Bradshaw* attest, is open to varying interpretations. The plurality in *Bradshaw* confirmed *Edwards* as holding that once the right to counsel has been asserted by an accused, no further interrogation should take place "unless the accused himself initiates further communications." 103 S.Ct. at 2834. Justice Powell, in a concurring opinion, opined that the only new element in *Edwards* was the emphasis on the prosecution's burden of proof where "the critical question of waiver focuses on whether the initial communication by the police was proper." 103 S.Ct. at 2838 n. 2.

In his dissenting opinion in *Bradshaw,* Justice Marshall claimed that eight Justices of the Court "manifestly agree" that *Edwards* created a *per se* rule.

* * *

> The rule is simply stated: unless the accused himself initiates further communication with the police, a valid waiver of the right to counsel cannot be established. If an accused has himself initiated further communication with the police, it is still necessary to establish as a separate matter the existence of a knowing and intelligent waiver under *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938). The *only* dispute between the plurality and the dissent in this case concerns the meaning of 'initiation' for purposes of *Edwards' per se* rule.

103 S.Ct. at 2840 n.2.

Whatever nuances may lurk in *Edwards,* as interpreted by *Bradshaw,* for present purposes the controlling principle is clear: If the police initiate further questioning after an accused requests the presence of counsel, resulting statements are excludable apart from the issue of waiver. Here it is not disputed that Wainwright actually invoked his right to counsel and thus activated the requirement that the State prove that his later incriminatory statements were the result of discussions initiated by him and were the product of a knowing and intelligent waiver of his rights under the Fifth Amendment. Wainwright's contention that Detective Griffith initiated the discussion which led to the statements, if supported by the record, would, of course, preclude application of the initiation prong of *Edwards* and foreclose the State from discharging its burden of proof on the overall issue of waiver. We turn then to the question of whether the conduct of the police in this case amounted to "initiation" within the meaning of *Edwards.*

IV

Defendant argues that Detective Griffith's comments regarding the nature of the charge and his recitation of the substance of Dodson's statement implicating Wainwright constituted initiation of further conversation by the officer, after Wainwright has asserted his right to counsel. The State maintains that Detective Griffith's comments were mere amplification of the charges made incident to the routine booking procedure. The State points to the fact that the defendant's initial incriminating statement was not made in direct response to Detective Griffith's comments but occurred "spontaneously" approximately forty-five minutes after the defendant had been given lunch, awaiting the opening of the Magistrate's Court.

In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Court held that "interrogation" under *Miranda* need not amount to actual questioning and may instead be the "functional equivalent" of such questioning. The Court defined the latter to include "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 302.

The State's argument that Detective Griffith's recital of what Dodson had earlier told police concerning Wainwright's participation in the liquor store robbery was a normal part of the booking processing ignores what had already occurred up to that point. Wainwright had been arrested in Maryland six days earlier on the strength of a fugitive warrant. At the time of his arrest in Maryland,

Wainwright, in Detective Griffith's presence, had been advised generally of the charges against him and had been read his *Miranda* rights. Presumably at the time of his court appearance to waive extradition, the defendant was again advised of the charges awaiting him in Delaware.[1]

Upon his arrival in Delaware the defendant was hardly in ignorance of why he was being processed. Notwithstanding the defendant's generalized knowledge of the charges against him, however, it was clearly appropriate for Detective Griffith to complete the formalities of the booking process including, again, advising the defendant of the charges against him before taking him to the nearest available Justice of the Peace for his initial appearance as required by 11 *Del. C.* § 1909 and Superior Court Rule 5(a). In going beyond the formalities of the booking process to describe the State's evidence, particularly the highly incriminatory accusations of Dodson, Detective Griffith engaged in a gratuitous and totally unnecessary

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[1]In Maryland, under the Uniform Criminal Extradition Act, after arrest the accused must be taken before a judge of a court of record who is required to inform the accused of the demand made for his surrender and the crime with which he is charged, and that the accused has the right to demand and procure legal counsel; and if the accused states that he desires to test the legality of his arrest, the judge must fix a reasonable time within which the accused can apply for a writ of habeas corpus. Md. Ann. Code art. 41 §§ 1 *et seq.* (1982). The accused may waive the issuance and service of the Governor's warrant for the arrest and all other procedure incidental to extradition proceedings by executing a writing in the presence of a judge which states that the accused consents to return to the demanding state. The judge must, however, inform the accused of his rights to the issuance and service of a warrant of extradition and of his right to obtain a writ of habeas corpus. *Id.* at § 39.

tactic which was reasonably calculated to elicit a reaction from the defendant.

The fact that Wainwright's elicited reaction came not immediately but forty-five minutes later when taken from his cell to the magistrate court does not sanitize it. The response made: "I didn't kill him, he stabbed me twice" was understood by Detective Griffith to be a denial of the killing but also a claim by Wainwright that Dodson had stabbed Wainwright. Clearly Wainwright's statement was directly responsive to Dodson's claim, as recited by Detective Griffith, that Wainwright had been the triggerman while Dodson had remained outside. Even though the statement tended to be exculpatory, in fact it was highly inculpatory because it placed Wainwright at the scene and thus corroborated Dodson's statement to that effect.

Nor does the fact that the defendant's statement was made after he was placed alone in a cell render it a purely spontaneous one. Indeed, the opportunity to mull over the effect of Dodson's accusatory statements could reasonably have had the opposite effect—to impress upon the defendant the seriousness of his predicament and the need to rebut his codefendant's accusations. Any attempt to "spark" the accused's initiative to make a statement in the absence of counsel through presentation of evidence will contaminate the waiver. *Bryant v. State*, Md. Ct. Spec. App., 49 Md. App. 272, 431 A.2d 714, 718 (1981), *cert. denied*, 291 Md. 772 (1981); *cert. denied*, 456 U.S. 949 (1982); *see also State v. Quinn*, Md. App., 498 A.2d 676 (1985).

In sum, we conclude that the defendant's initial statement to Detective Griffith made outside the Magistrate's

Court was an elicited response to a statement made by a policeman which was reasonably likely to produce such a response. Since the defendant's elicited statement followed his request for the assistance of counsel, its admission into evidence is barred under the evolving standards of *Edwards* and *Bradshaw*.

Having determined that defendant's initial incriminatory statement was neither spontaneous nor volunteered it is unnecessary to determine whether his further statements, made after Detective Griffith reminded the defendant that he had asked for an attorney and the defendant's subsequent indication of a desire to retract his request are admissible. If, as clearly appears, the defendant's discussion of the incident was prompted by police initiation, subsequent waiver by defendant in the same continuing dialogue is also tainted. Moreover, even if defendant's second statement be viewed separately it was made only after Detective Griffith led the defendant to believe that he would contact an attorney who could be present before the defendant resumed his statement. Detective Griffith conceded that his effort to secure an attorney for the defendant was limited to a phone call to the office of the Deputy Attorney General. When he was unable to make contact with the prosecutor, the officer made no further effort to contact defense counsel and never made any effort at direct contact with the Office of the Public Defender. Thus we need not decide whether the subsequent statement by the defendant was the result of a fresh waiver made after a good faith, but unsuccessful, effort to provide the defendant with counsel. Even if the second statement is separately evaluated, it does not gain admissibility under the existing standards of "strong proof of the valid-

ity of that waiver." *See North Carolina v. Butler,* 441 U.S. 369, 374 (1979).

V

Because we conclude that the defendant's statements to Detective Griffith are rendered inadmissible by reason of the violations of his right to counsel under the Fifth Amendment, we decline to address his claim that his Sixth Amendment right to counsel is equally implicated. We need not, and do not, decide whether the proceedings against the defendant had reached the critical stage in the adversary process where the right to counsel was mandated in any event. *See Deputy,* 500 A.2d at 590. We note, however, that even though the defendant's statements were made immediately preceding his initial appearance before a magistrate in Delaware, he had, as part of the extradition process apparently appeared before the District Court in Maryland earlier that day. Moreover, if defendant's statements fail to gain admissibility under the standards which control his right to counsel under the Fifth Amendment, *a fortiori,* it is difficult to see how the State could meet the more exacting standards for admissibility which govern waiver of the Sixth Amendment right to counsel. *See Massiah v. United States,* 377 U.S. 201 (1964).

* * * *

The conviction is REVERSED and the case is REMANDED for a new trial.

RELEVANT DELAWARE STATUTORY PROVISIONS

Del. Code Ann. tit. 11, sec. 271 (1979). Liability for the conduct of another—Generally.

A person is guilty of an offense committed by another person when:

. . . .

(2) Intending to promote or facilitate the commission of the offense he:

. . . .

b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it.

Del. Code Ann. tit. 11, sec. 636 (1979). Murder in the first degree.

(a) A person is guilty of murder in the first degree when:

(6) He, with criminal negligence, causes the death of another person in the course of and in furtherance of the commission or attempted commission of rape, kidnapping, arson in the first degree, robbery in the first degree, or immediate flight therefrom.

Del. Code Ann. tit. 11, sec. 1447 (1979). Possession of a deadly weapon during the commission of a felony.

(a) A person who is in possession of a deadly weapon during the commission of a felony is guilty of possession of a deadly weapon during commission of a felony.

Rule 3, Delaware Superior Court Rules of Criminal Procedure. Commencement and Complaint.

Proceedings may be instituted by indictment (except where otherwise provided by the Constitution of

this State), by complaint, or by arrest where arrest is permissible without a warrant.

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a committing magistrate or any other person authorized by law to issue a warrant. The complaint may be made upon personal knowledge or upon reasonable information and belief.

Rule 4, Delaware Superior Court Rules of Criminal Procedure. Warrant or Summons Upon Complaint.

. . . .

(b) Form.

(1) Warrant. The warrant shall be signed by the committing magistrate or other person authorized by law to issue a warrant and shall contain the name of the defendant or, if his name is unknown, any name or description by which he can be identified with reasonable certainty. It shall describe the offense charged in the complaint but need not set out all the elements of the offense. It shall command that the defendant be arrested and brought before the nearest available Justice of the Peace of the county in which the offense is alleged to have been committed, unless the warrant is signed by a person other than a Justice of the Peace, in which case the warrant may command that the defendant be arrested and brought before the committing magistrate or court out of which the warrant was issued. A copy of the complaint shall be attached to the warrant.

(c) Execution or Service and Return.

. . . .

(3) Manner. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the defendant as soon as possible. If the officer does not

have the warrant in his possession at the time of the arrest, he shall then inform the defendant of the offense charged and of the fact that a warrant has been issued. The summons shall be served upon a defendant by delivering a copy to him personally, or by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address.

Rule 5, Delaware Superior Court Rules of Criminal Procedure. Initial Appearance Before the Committing Magistrate.

(a) Initial Appearance. An officer making an arrest with or without a warrant or any other authorized peace officer shall take the arrested person without unreasonable delay before either the nearest available Justice of the Peace of the county in which the offense is alleged to have been committed, or before a Justice of the Peace previously designated by the Chief Justice of the Delaware Supreme Court, or a judge of the Municipal Court for the City of Wilmington, or the court out of which the warrant issued in accordance with the command of the warrant. When an arrest is made without a warrant, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause.

(b) Statement by the Committing Magistrate. The defendant shall not be called upon to plead. The committing magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The committing magistrate shall also in-

form the defendant of his right to a preliminary hearing. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

. . . .

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1105

September Term, 1985

CHRISTOPHER HOLMES CONOVER

V.

STATE OF MARYLAND

Bloom
Karwacki
Wenner,
JJ.

———o———

PER CURIAM

———o———

Filed: April 2, 1986

On May 23, 1985, a jury in the Circuit Court for Baltimore County convicted appellant, Christopher Holmes Conover, of two counts of murder, one count of attempted murder, and one count each of assault with intent to murder, burglary, and use of a handgun in the commission of a crime of violence. The court sentenced him to two consecutive life terms for the murders, one concurrent life term for the attempted murder, thirty years concurrent for the aggravated assault, twenty years concurrent for the burglary, and ten years consecutive for the handgun violation. Conover filed a timely appeal.

During the trial, Linda Jordan testified that appellant and another white male knocked on her door and identified

themselves as police. Once inside, the two men drew guns, handcuffed Mrs. Jordan, her husband, and Lisa Brown, Mrs. Jordan's daughter. The victims were forced to lie on the floor. The two men ransacked the house and then admitted a black male named Jones. Jones held a gun on the victims and stuffed gags into their mouths. Shortly thereafter Mrs. Jordan heard gunshots and saw that her daughter had been shot. Mrs. Jordan then saw Jones shoot Mr. Jordan in the back of the head. Jones then fired two shots into the back of Mrs. Jordan's head.

The perpetrators left and then, realizing that Mrs. Jordan was still alive, fired several shots through the sliding glass doors at the rear of her house, hitting her in the leg. Mrs. Jordan survived and managed to summon the police.

The State introduced a microscopic analysis which matched hair fibers found on Lisa Brown's body with appellant's hair. Appellant produced three witnesses who testified that he was attending a party about two miles away at about the time the crimes were committed.

Appellant presents four arguments: first, that the court erred in denying appellant's motion to suppress a statement made to the police; second, that the court erred in instructing the jury; third, that the court erroneously admitted hearsay evidence at appellant's sentencing hearing; and fourth, that the court erred in imposing more than one mandatory sentence without parole. We address the issues *in seriatim*.

I. Motion to Suppress

The record reflects that appellant was properly arrested and read his rights consistent with the directives of *Miranda v. Arizona*, 384 U.S. 436 (1966). At police headquarters appellant was again read his *Miranda* rights and was then interviewed by Detective Long, another detective, and an agent from the Federal Bureau of Investigation. Appellant immediately requested an attorney, at which time Detective Long ceased asking questions.

At trial, Detective Long testified that after appellant's request he told appellant an attorney would be provided. Appellant was not asked any more questions. Instead, the detectives "reviewed" with appellant the charging documents filed against him. These documents were part of a "packet" which included the application for the charging document. The application described much of the evidence against appellant and stated that a .38 caliber pistol had been used in the shootings.

After reviewing this information, appellant, according to Detective Long, began speaking in hypotheticals and asking questions described by Detective Long as "suppose this, suppose that, what if?" Appellant then, apparently without prompting, suddenly stated, "You can't put me with that .38." The entire interview lasted about fifteen minutes. The court refused to suppress the statement, and the State introduced it and referred to it in argument.

Appellant now argues that once he requested an attorney all interrogation should have stopped. He insists that the "review" of the charging documents and evidence constituted continued interrogation and that admission of

statements made thereafter was prejudicial and reversible error. We agree.

On cross-examination, appellant's attorney elicited from Detective Long the details of the "review" of the charging documents. The relevant points are as follows:

(a) Detective Long testified that the documents were read to appellant and then handed to him. Detective Long said he reviewed the documents with appellant by "[h]anding him a charging document and telling him why he's there, why he's being arrested, what he's being arrested for and here is [sic] the charging documents used against you. Read them, look at them, if you have any questions ask them."

(b) The following colloquy occurred between defense counsel and Detective Long:

Q. It seemed to me that during the course of your direct examination you had said that after the Miranda warnings were given he started talking, is that correct, immediately?

A. He just started talking, yes.

Q. He just started talking. Did anybody suggest anything to him about what the evidence was against him?

A. No.

Q. Nobody said that there had been a positive ID made on you and your brother and that there was a .38 clip found in the apartment?

A. The only evidence that was presented to him at the time was the evidence that was stated in the probable cause and for the application for the statement of charges.

Q. Well, you had that at that point, didn't you?

A. Yes. We had the charging document itself so he would have the whole packet, which he could have reviewed.

Q. But that wasn't suggested to him?

A. No, sir.

(c) Finally, the court asked, "Did you [Detective Long] make any statement at all after he [appellant] said he wanted a lawyer to prompt him to make any more comments?" "No, sir, Your Honor" was the answer.

The question we must now answer is whether this "review" of the charging documents amounted to an interrogation in violation of appellant's rights. We need not belabor that question, for one almost identical to it was answered quite recently in *State v. Quinn*, 64 Md. App. 668 (1985). In that case, the investigating officer gave the defendant a copy of the "Statement of Charges" which included an application for the statement of charges, a form from the district court. Chief Judge Gilbert settled the matter presented in *Quinn* and here when he wrote for the court:

> When the trooper handed the application to Quinn [defendant below] to read, it was the same as if he had said to Quinn, "Look and see for yourself what I have against you. Now what do you have to say"? We believe . . . that the trooper's actions were deliberately designed to circumvent *Miranda* and *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)]. What the trooper did was innovative; it was also impermissible. We repeat what we said in *Bryant* [*v. State*, 49 Md. App. 272, *cert. denied*, 291 Md. 772 (1981), *cert. denied*, 456 U.S. 949 (1982)]:

> "[O]nce the right to the presence of counsel has been made by the accused, arrestee, or suspect, any attempt by the authorities to 'spark' the accused's 'own initiative' will contaminate the waiver and render it a nullity."

49 Md. App. at 280, 431 A.2d at 718.

There are no "short cuts" to *Miranda* compliance. *Id.* at 674. We see no difference between *Quinn* and the case *sub judice*, and we accordingly hold that the police violated appellant's rights under *Miranda* by presenting him with the charging documents, including the application for the statement of charges, after he had requested an attorney. The statement elicited thereby was thus inadmissible and should have been suppressed.

We also hold that the error was prejudicial and thus requires reversal. The standard of review applicable here was set forth in *Dorsey v. State* wherein the Court of Appeals said that "unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error *in no way* influenced the verdict, such error cannot be deemed 'harmless' and a reversal is mandated." 276 Md. 638, 659 (1976) (emphasis added).

We cannot say, beyond a reasonable doubt, that the appellant's outburst that "[y]ou can't put me with that .38" in no way influenced the jury. While there was unquestionably a great deal of evidence against appellant, there was not so much as to overwhelm the impact of the statement or render it insignificant. It is true that Mrs. Jordan identified appellant as one of the assailants. It is also true that three unimpeached witnesses placed him at a party almost two miles away. It is true that a micro-

scopic test of hair fibers found on Lisa Brown's body matched appellant's own hair, yet the analyst admitted that such comparisons, while good, are not as reliable or conclusive as fingerprints.

Finally, if the statement was not prejudicial, as the State contends, why, we ask, was it even used? We are hard pressed to believe that the State would fight an objection over admission of the statement in evidence unless the statement helped its case. Although the statement is seemingly exculpatory on its face, it has a connotation that suggests involvement in the crime that appellant is confident cannot be proved. Why offer it otherwise?

II. Erroneous Instructions

Appellant alleges error by the court below in two instances. First, appellant attacks the court's comment that "[t]he defendant does have the burden of proving his innocence or producing any evidence." Second, appellant contends the court erred in giving instructions on alibi when it said, "When such a claim [alibi] is thoroughly established, it precludes the possibility of guilt."

The first instruction clearly seems to be either a slip of the tongue by the court or an omission by the reporter in transcribing the proceedings. (The State, by motion to this court, supplemented the record with an affidavit of the court reporter in which she swore that the error was hers and that the instruction should have read "the defendant does *not* have the burden" of proof.) In either case, the error was obviously an accidental one, not likely to be repeated in the event of a retrial; and since we are reversing the convictions as explained above, we see no need to address this issue further.

Likewise, the second instruction illustrates a mere poor choice of words, not a misunderstanding of the applicable law. This error, too, was accidental and unlikely to be repeated. We need not address it here.

III. Hearsay Evidence

At the sentencing hearing, the court permitted the State to introduce four types of documents, to-wit: commitment records of the Department of Corrections, commitment records of the Circuit Court for Baltimore County, docket entries, and charging documents. Appellant objects that these documents contained hearsay information and should have been excluded. We disagree. The commitment records, docket entries, and charging documents of the circuit court were certified as true copies by the clerk of the court. They were thus admissible under Md. Cts. & Jud. Proc. Code Ann. § 10-204 (1984). The other documents merely duplicated the information provided by the circuit court documents. We find no error in admitting to any of them.

IV. Mandatory Sentences

The State agrees with appellant, as indeed it must, that the court erred in imposing two mandatory sentences pursuant to Md. Ann. Code art. 27, § 643B. This is clearly prohibited by *Calhoun v. State*, 46 Md. App. 478 (1980), *aff'd* 290 Md. 1 (1981).

JUDGMENTS REVERSED

COSTS TO BE PAID BY BALTIMORE COUNTY.